BARTKIEWICZ, KRONICK & SHANAHAN

A PROFESSIONAL CORPORATION
1011 TWENTY-SECOND STREET
SACRAMENTO, CALIFORNIA 95816-4907
TELEPHONE (916) 446-4254
bkslawfirm.com

RICHARD P. SHANAHAN
RYAN S. BEZERRA
JOSHUA M. HOROWITZ
JENNIFER T. BUCKMAN
ANDREW J. RAMOS
BRITTANY N. BRACE
CHRISTINE M. DUGGER

Of Counsel
HOLLY J. JACOBSON

Retired
PAUL M. BARTKIEWICZ
STEPHEN A. KRONICK

A SUMMARY OF THE CALIFORNIA LAW OF SURFACE WATER AND GROUNDWATER RIGHTS
October 2020

This summary briefly discusses the California law of surface water and groundwater rights, including provisions for transfer of different types of water rights and entitlements. It is necessarily general and its descriptions of relevant laws may not accurately characterize how those laws would apply and interact in a specific situation. Please consult an attorney regarding specific water right issues. The State Water Resources Control Board's ("State Board") website includes publications that provide additional information on California water rights.[1]

1. Constitutional Requirement of Reasonable and Beneficial Use

Enacted by the voters in 1928, Article X, section 2 of the state Constitution states the basic principles governing the use of California's water. First, it states an overarching principle that "because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable." Second, it recognizes water rights. Third, it limits the scope of water uses "to such water as shall be reasonably required for the beneficial use to be served" and states that water rights do "not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water." The courts have recognized Article X, section 2 as defining the fundamental basis for California water law. The California Supreme Court has stated that Article X, section 2 "establishes state water policy. All uses of water, including public trust uses, must now conform to the standard of reasonable use." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419,

[1]The State Board's website is located at www.waterboards.ca.gov.

443.) The United States Supreme Court has described Article X, section 2's function as follows: "The governing water law of California must now be derived from a 1928 Amendment to its Constitution which compresses into a single paragraph a reconciliation and modification of doctrines evolved in litigations that have vexed its judiciary for a century." (*United States v. Gerlach Live Stock Co.* (1950) 339 U.S. 725, 743.)

As constitutional law, Article X, section 2 governs all of California's statutory water law, but certain statutes implement its terms expressly. (See Water Code § 275: "The department [of water resources] and [state water resources control] board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.")

2. Surface Water Rights

A. Riparian Rights

Riparian water rights are rights that an owner of land contiguous to a natural stream possesses to divert the naturally-available supply directly to use, without artificial storage, for reasonable, beneficial purposes on that riparian land. Riparian land is the smallest parcel of such contiguous land, in a single chain of title from the original private owner, that is within the watershed of the stream. The right arises by virtue of ownership of the riparian land, and is not gained by use nor lost by nonuse. Generally, the riparian right is superior to the other types of surface water rights, but the riparian right does not authorize water to be stored for later use. The riparian right may be junior to an appropriative water right that was perfected before a patent on the riparian land was issued by the United States. The riparian rights of owners of land that are riparian to the same source are "correlative," in that, if there is insufficient water available for all riparians, each is entitled to a fair share of the available supply based upon, among other factors, the amount of their land and their reasonable water supply needs.

Where interests in the riparian parcel are conveyed or the riparian parcel is subdivided, the riparian right as to any subparcel that is no longer contiguous to the

source of water may be severed, absent the intent to retain the riparian nature of the severed parcel.

B. Appropriative Rights

Appropriative rights to surface water are rights to divert and use unappropriated water, that is, water that is surplus to the needs of riparian owners and prior appropriators. Appropriative rights are based not on land ownership, but on actual diversion and use of water. They are rights of priority, in that, if the available surface water supply is insufficient to meet the needs of all appropriators, the one with an earlier priority date is entitled to satisfy his or her needs fully before those with later priority are entitled to any water. An appropriative right may be established to use water for any reasonable, beneficial purpose on any land no matter where located, and to store water from one season for use in a later season, or from one year for use in subsequent years. Just as appropriative rights are gained by use, they may be lost wholly or in part by five years' nonuse during a time when the water was physically available for use. (*North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555.) One Court of Appeal decision has held that, for forfeiture to occur, there must be a "clash of rights" resulting from competition for the water at issue during the forfeiture period. (*Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879.)

Prior to 1914, appropriative rights could be acquired simply by posting or filing a notice, and then diverting and using the water for reasonable, beneficial purposes (referred to as "pre-1914 water rights"). Since 1914, California statutory law has required that an application be filed and a permit obtained from a State agency, now the State Board. The State Board has the discretion to decide whether unappropriated water exists, and whether the proposed use under the application is reasonable, beneficial and in the public interest. If the State Board finds affirmatively on these issues, it can issue a permit, and then, after the diversion and use facilities have been constructed and the water appropriated has been fully put to beneficial use within the time allowed, the State Board can issue a license confirming that the water right has been perfected by use for the amount used.

A critical aspect of appropriative rights is their flexibility. Many elements of an appropriative right may be changed as long as they do not initiate a new water right, which generally would occur where a change would increase the amount of water diverted or the season of diversion. (See generally State Board Order WR 2009-0061.) Under Water Code section 1706, the holder of a pre-1914 appropriative water right generally may change it unilaterally as long as the change does not initiate a new right and does not injure other legal users of water. Changes to post-1914 appropriative water rights generally require the State Board's approval under Water Code sections 1700 to 1705, with the "no injury" rule being embedded as a governing rule by Water Code section 1702. The application of the "no injury" rule is discussed further below in relation to water transfers.

Under Water Code sections 5100 through 5107, the holder of an appropriative water right is required to file periodic statements with the State Board of diversion and use of water under the water right, although holders of water-right permits and licenses issued by the State Board or its predecessor agencies generally report their water use under the terms of those permits and licenses. Under section 5107, failures to file the required statements, misstatements and tampering with measuring devices are subject to financial penalties under certain circumstances. Under section 5103, most diversions occurring after July 1, 2016 must be reported as required by the State Board in its regulations. These regulations are sections 907 through 938 of title 23 of the California Code of Regulations.

C. Prescriptive Rights to Surface Water

Prescriptive water rights can be created by five years' open and notorious use of water under a claim of right that is adverse to one or more existing prior rights: riparian, appropriative or prescriptive. Prescriptive rights, however, cannot be obtained against the State's interest in allocating water in the public interest. (*People v. Shirokow* (1980) 26 Cal.3d 301.) If one can be obtained a prescriptive water right can be established for reasonable and beneficial use on any land, and water can be diverted directly to use or stored for later use. Prescriptive rights, however, cannot be acquired against public agencies or public utilities. (Civil Code § 1007.) Prescriptive rights, like appropriative rights, can be lost by five years' nonuse.

D. The Public Trust Doctrine

In *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, the California Supreme Court held that the State, in accordance with Article X, section 2 of the State Constitution, as trustee of the "public trust," retains supervisory control over all the State's waters to protect navigation, fishing, recreation, ecology and aesthetics. No person has a vested right to appropriate water in a manner harmful to the interest protected by the public trust. *National Audubon* concerned Los Angeles's diversions from creeks in the Mono Lake basin. The Supreme Court stated, "[i]n the case before us, the salient fact is that no responsible body has ever determined the impact of diverting the entire flow of the Mono Lake tributaries into the Los Angeles Aqueduct."

E. The County of Origin Law (State Filings)

In the 1920's, the State Legislature adopted legislation authorizing massive applications by the State for future water development projects. In order to attempt to allay the fears of areas from which water projects might transfer water, the Legislature passed certain "area of origin" laws. Specifically, in 1931, the Legislature passed the County of Origin Law (Water Code § 1055), and, in 1933, the Legislature adopted the Watershed Protection Law (Water Code §§ 11460 – 11463), which is discussed in the next section of this document.

The State, acting through the Department of Water Resources ("DWR," and previously the Department of Finance), is authorized to appropriate water (and has done so) for future water projects (known as "State filings"). (See Water Code §§ 10500 - 10507.) The State Board is authorized to release from priority, or assign these State filings to, other agencies or entities when the release or assignment is for the purpose of development not in conflict with the State water plan. (Water Code § 10504.) Under the County of Origin Law, the State Board is expressly prohibited from assigning or releasing the priority when, in its judgment, the effect could be to deprive the county in which the water originates of water necessary for its development. (Water Code § 10505.)

The legislative intent and effect of section 10505 was to provide protection for the future interest of the counties of origin by placing restrictions on the authority of the State to transfer or dispose of the priorities vested in the State by filing applications to appropriate unappropriated water. (25 Ops.Cal.Atty.Gen. 8, 15 (1955).) Section 10505 applies only to applications filed by the State. The county of origin provisions do not apply to water rights that are not based on assignment or release of a State filing.

F. The Watershed of Origin Protection Act ("Area of Origin Act")

The "Watershed of Origin Protection Act" (Water Code §§ 11460 – 11465, sometimes referred to as the "area of origin law") operates to protect the priority of water rights within the watershed against Central Valley Project and State Water Project export rights in two major ways: (a) by giving protected areas a preferential right to contract for State-developed water, and (b) by allowing later upstream developments within the watershed to obtain priority as against the State's projects. Water Code section 11460 states: "In the construction and operation by the department [DWR] of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein."

The area of origin law does not entitle protected areas to State-developed water free of charge, nor does it allow the protected areas to gain any priority against entities other than the State or the United States (see below concerning Water Code § 11128) who may export water out of the watershed. Area of origin rights are not transferable to an area outside the area of origin. The area of origin law does not create any hierarchy of preference between areas included within the same watershed. The Central Valley Basin contains two watersheds: one comprising the Sacramento River and its tributaries down to and through the Delta, and another comprising the San Joaquin River and its tributaries. (29 Ops.Cal.Atty.Gen. 136 (1957).)

The United States must comply with the area of origin law when it seeks a priority established under a state filing (Water Code § 10500). (See 25 Ops.Cal.Atty.Gen. 8, 28 - 29 and Water Code § 10505.5: "Every application heretofore or hereafter made and filed pursuant to section 10500 . . . shall provide that the application, permit or license shall not authorize the use of any water outside the county of origin which is necessary for the development of the county.") Under Water Code section 11128, the area of origin law applies to the operation of the federal Central Valley Project. (See also, *California v. United States* (1978) 438 U.S. 645.)

G. The Delta Protection Act

Article 4.5 of Division 6 of the Water Code (commencing with § 12200) sets forth the Delta Protection Act, which provides for salinity control and maintenance of an adequate water supply in the Sacramento-San Joaquin Delta ("Delta") Delta for reasonable and beneficial uses of water, and relegates to lesser priority all exports of water from the Delta to other areas for any purpose.

3. Groundwater Rights

Groundwater rights attach to percolating groundwater, which includes all groundwater that does not comprise a subsurface stream or the underflow of a surface stream. The priority of rights in groundwater can vary depending on the source of groundwater recharge. An underground stream is a stream or river flowing in a definite channel in an underground watercourse. The underflow of a surface stream is the water in the soil, sand and gravel comprising the bed of a stream in its natural state and essential to its existence. Water in a stream's underflow or an underground stream is treated like surface water for legal purposes, including State Board permitting. (See Water Code § 1200.) It often is in contact with the surface flow, and flows in the same direction. Courts have classified water rights in percolating groundwater as overlying, appropriative or prescriptive. No water right permit is required to pump percolating groundwater.

A. Overlying Rights

Overlying groundwater rights are analogous to riparian rights to surface water. Each owner of land that overlies a common groundwater supply has a right to reasonable, beneficial use of the water of that supply on or in connection with the overlying land. The use of each overlying landowner is "correlative" with the rights of all other owners of land overlying the same groundwater supply. In the event of insufficiency of the supply for the requirements of the overlying landowners, the water may be apportioned among them all by a court decree. There is no priority in time among overlying pumpers.

Similar to riparian rights, the transfer of title to an overlying groundwater right, separate from the land, can result in a permanent severance of the right from the land. Once the overlying water right has been severed, the parcel ceases to be an overlying parcel and it loses its overlying groundwater right. One acknowledged way to transfer the right to exercise an overlying right, without causing a severance of the right, is the transfer of the overlying right to a mutual water company, which acts as an agent or trustee of the owners of the overlying right. At least one case has suggested that the right to exercise an overlying right could also be transferred to a public agency or an agent or trustee without resulting in a severance of the right. (See *Orange County Water District v. City of Colton* (1964) 226 Cal.App.2d 642.) While no California Supreme Court or Court of Appeal decision has ruled on this practice, in comprehensive adjudications of groundwater rights in a basin, Superior Court judgments in groundwater adjudications have allowed overlying rights to be transferred within a basin on the theory that allowing such transfers maximizes the reasonable use of water pursuant to Article X, section 2 of the California Constitution.

B. Appropriative Rights

Water users that do not use groundwater on their overlying land are not barred from pumping and using groundwater. Such water users include public agencies and owners of non-overlying land. They may extract groundwater, but their rights are analogous to appropriative rights to surface water. Unless there has been an adjudication of the groundwater basin rights, their use may be limited to surplus water, which is defined as water in excess of the safe annual yield that is

not needed for reasonable, beneficial use by the overlying owners. If the basin is in overdraft, pumping and use may be restricted to the overlying owners, subject to other factors as discussed below. As between groundwater appropriators, the one first in time is the first in right, and a prior appropriator is entitled to all the water he or she needs, up to the amount he or she has taken in the past, before a subsequent appropriator may pump and use any groundwater.

Appropriative rights in water that artificially recharges a groundwater source have unique legal status. The right to pump such water has priority over overlying rights to the extent that the artificial recharge augments the groundwater source's sustainable yield. (See *Los Angeles v. San Fernando* (1975) 14 Cal.3d 199.) These rights most commonly arise as a result of the percolation of return flows from the use of surface water imported into the relevant groundwater basin from elsewhere. (*Id.*) Recharge that occurs because surface water that is native to a basin is stored for later percolation into the groundwater, rather than being allowed to flow out of the basin, also can be treated in this way. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266 (recognizing a stipulated judgment in a groundwater adjudication as a proper contractual allocation of such water).) Where the recharge derives from discharges from a wastewater treatment facility, the facility's owner "shall have the exclusive right" to that water relative to the water supplier who delivered the water that eventually was discharged into the facility. (Water Code § 1210.)

C. Prescriptive Rights

Prescriptive groundwater rights are not acquired by taking surplus or excess water. An appropriative taking of groundwater that is not surplus is wrongful, and may ripen into a prescriptive right when the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under a claim of right. (See generally *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224.) Prescriptive groundwater rights are most often obtained when someone pumps groundwater during an obvious overdraft condition.

D. Groundwater Adjudications

Groundwater rights generally are not quantified unless the groundwater basin is adjudicated. The authority to adjudicate a groundwater basin exists in State courts, and in limited circumstances, with the State Board. In an adjudication, junior groundwater right holders generally try to prove that they have obtained higher priority pumping rights by pumping for at least five years during an overdraft of which the senior groundwater right holders had notice. If the junior right holders prove such a case, then, under the doctrine of "self-help," the senior right holders retain their priority to only as much water as they actually pumped during the relevant period. In such a situation: (1) an overlying landowner's "correlative" right to a reasonable share of a basin's safe yield effectively may be replaced with a right based on its past water usage; and (2) a public agency with only a junior appropriative right may be able to obtain a higher priority. The California Supreme Court has held that Civil Code section 1007 prevents prescription against public agencies' groundwater rights or such rights that a public utility has dedicated to public use. (See *Los Angeles v. San Fernando* (1975) 14 Cal.3d 199; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224; *Hi-Desert County Water Dist. v. Blue Skies Country Club, Inc.* (1994) 23 Cal.App.4th 1723.) As noted above, in prior adjudications, Superior Court judgments have authorized the transfer of overlying rights on the theory that doing so maximizes the reasonable beneficial use of water pursuant to Article X, section 2, of the California Constitution. In 2015, the Legislature enacted special judicial procedures to govern "comprehensive adjudications." (See Code of Civil Procedure §§ 830-852.)

E. Conjunctive Use of Surface Water and Groundwater

DWR Bulletin 160-98, *The California Water Plan Update* (November 1998, Volume 2, page G-2), defines "conjunctive use" as "the operation of a groundwater basin in combination with a surface water storage and conveyance system. Water is stored in the groundwater basin for use by intentionally recharging the basin during years of above-average water supply." Conjunctive use can involve direct recharge or "in lieu" recharge. "In lieu" recharge occurs when someone uses surface water in lieu of pumping groundwater. The storage aspects of the conjunctive operation of a groundwater basin may contemplate both storage of surface water in

available basin storage space and increasing pumping from the basin to create additional storage space.

The conjunctive use of surface water and groundwater is favored under California law and policy. (See *Los Angeles v. Glendale* (1943) 23 Cal.2d 68, and *Los Angeles v. San Fernando*, referred to in the previous section.) Water Code section 1242 states, "The storing of water underground, including the diversion of streams and the flowing of water on lands necessary to the accomplishment of such storage, constitutes a beneficial use of water if the water so stored is thereafter applied to the beneficial purposes for which the appropriation for storage was made."

Under Water Code sections 1005.1 through 1005.4, the reduction in the extraction of groundwater by the owner of a right to extract, as result of the use of an alternative supply of water, is deemed to be equivalent to establishing and maintaining a right to extract the groundwater. In other words, in some circumstances, a person who reduces his groundwater extraction due to the development of a surface water supply does not diminish, as a result, his groundwater rights and potentially can rely on surface water use as the legal equivalent of groundwater use.

4. Groundwater Management

In 2014, the Legislature enacted California's first comprehensive groundwater management law, the Sustainable Groundwater Management Act ("SGMA").

A. The Role of Groundwater Basins under SGMA

SGMA is organized according to groundwater basins as designated by DWR. Basins are identified in DWR's Bulletin 118, subject to possible modifications of the existing basins. Many Bulletin 118 basins are not defined by geology, but rather by political or other boundaries. This is how Bulletin 118 divides the Central Valley into separate basins. SGMA established a process for modifying basin boundaries based on, among other things, scientific criteria or political arrangements or agreements. (Water Code § 10722.2.) DWR has approved multiple basin-boundary adjustments under SGMA in 2016.

As discussed below, many SGMA requirements depend on whether DWR has designated a basin as high- or medium-priority by DWR. DWR prioritizes basins under the California Statewide Groundwater Elevation Monitoring (CASGEM) program. (Water Code §§ 10920-10936.) The prioritization is largely on the population within a basin and on how dependent on groundwater water users in the basin are. (Water Code § 10933(b).)

B. Groundwater Sustainability Agencies ("GSAs")

SGMA requires that each high- or medium-priority basin have one or more GSAs designated to manage that basin by June 30, 2017. If there is no GSA for an area of a high- or medium-priority basin by July 1, 2017, groundwater users within that area must begin reporting their pumping to the SWRCB by December 15, 2017 and the SWRCB can declare the basin to be a "probationary basin" and seek to intervene in it. (Water Code §§ 5202, 10735.2(a)(1).)

Any local agency with water supply, water management or land use authority can decide to be a GSA. (Water Code §§ 10720(n), 10722.2.) A GSA can be a combination of local agencies, such as a joint powers authority. (Water Code §§ 10723(a), 10723.6.) An investor-owned utility or a mutual water company can participate in a GSA through an agreement with local agencies, but they would not gain regulatory powers as a result. (Water Code § 10723.6(b).) GSAs cannot exercise authority outside of their boundaries. (Water Code § 10726.8(b).)

GSA designations may overlap. SGMA states no priority among local agencies for becoming a GSA and does not authorize any state agency to resolve the overlap. Under the original SGMA enacted in 2014, an overlap prevented an agency from being an "exclusive" GSA. (Water Code § 10723.8 (prior to 2015 amendment).) Under SGMA as of January 1, 2016, as amended by 2015's SB 13, an overlap may prevent the overlapping agencies from being GSAs. (Water Code § 10723.8.) It may make a difference legally whether agencies' GSA designations occurred before or after January 1, 2016.

SGMA itself designates a number of agencies as the exclusive GSAs for their basins. (Water Code § 10723(c)(1).) Similarly, basins that are subject to past

judicial adjudications of groundwater generally are exempt from SGMA. (Water Code § 10720.8(a)-(d).)

C. Groundwater Sustainability Plans ("GSPs")

SGMA requires that all high- and medium-priority basins have a GSP that covers the whole basin by January 31, 2022 if they are not subject to critical overdraft or by January 31, 2020 if they are. (Water Code § 10720.7.) DWR has designated the basins in critical overdraft. (Water Code § 10720.7.)[2] SGMA authorizes a single GSP that covers the whole basin that is adopted by multiple GSAs and also multiple coordinated GSPs adopted by multiple GSAs. (Water Code § 10727(b).) Coordinated GSPs must be subject to a coordination agreement and utilize the "same data and methodologies" for their assumptions, including "change in groundwater storage," "water budget" and "sustainable yield." (Water Code § 10727.6.) SGMA largely exempted existing judicially-adjudicated basins from the GSP requirements. (Water Code § 10720.8.) Adjudicated basins generally are subject to other significant legal requirements that are intended to ensure they are managed sustainably.

By January 1, 2017, an agency could file one of three defined alternatives to a GSP that, if approved by DWR, would substitute for a GSP. (Water Code § 10733.6.) The possible alternatives were: (1) a groundwater management plan adopted under pre-SGMA law; (2) management under a judicial groundwater adjudication; and (3) an engineer's report that shows the basin has been managed sustainably over the previous 10 years. DWR has adopted regulations concerning the contents of GSP alternatives. (Cal. Code of Regulations, title 23, §§ 358-358.4.)

A GSP's primary objective is to ensure that a basin is managed to meet the "sustainability goal" of operating within its "sustainable yield" that does not produce any "undesirable results." (Water Code § 10727(a).) A GSP may, but is not required to, address undesirable results that existed in the basin before January 1, 2015. (Water Code § 10727.2(b)(4).) SGMA defines key terms as follows:

- The "sustainability goal" is "the existence and implementation of one or more groundwater sustainability plans that achieve sustainable

[2] www.water.ca.gov/groundwater/sgm/cod.cfm.

groundwater management by identifying and causing the implementation of measures targeted to ensure that the applicable basin is operated within its sustainable yield" (Water Code § 10721(u)); and

- A basin's "sustainable yield" is "the maximum quantity of water, calculated over a base period representative of long-term conditions in the basin and including any temporary surplus, that can be withdrawn annually from a groundwater supply without causing an undesirable result" (Water Code § 10721(w)).

SGMA identifies the following "undesirable results:"

- "Chronic lowering of groundwater levels indicating a significant and unreasonable depletion of supply if continued over the planning and implementation horizon," which is 50 years. (Water Code § 10721(r), (x)(1).)

- "Significant and unreasonable reduction of groundwater storage." (Water Code § 10721(x)(2).)

- "Significant and unreasonable seawater intrusion." (Water Code § 10721(x)(3).)

- "Significant and unreasonable degraded water quality, including the migration of contaminant plumes that impair water supplies." (Water Code § 10721(x)(4).)

- "Depletions of interconnected surface water that have significant and unreasonable adverse impacts on beneficial uses of the surface water." (Water Code § 10721(x)(6).)

A GSP must contain "measurable objectives" that show that the sustainability goal will be achieved within the basin within 20 years and a description of how the GSP's implementation is intended to achieve that goal. (Water Code § 10727.2(b)(1)-(2).) DWR can grant a five-year extension of the 20-

year period. (Water Code § 10727.2(b)(3).) DWR has adopted detailed regulations concerning GSPs' contents. (Cal. Code of Regulations, title 23, §§ 350-356.4) The preparation and adoption of a GSP is exempt from environmental review under the California Environmental Quality Act, but the actions to implement the GSP are not necessarily. (Water Code § 10728.6.)

If a basin is not covered by an adequate GSP, or adequate coordinated GSPs, by the applicable 2020 or 2022 deadline, then, under certain conditions and in consultation with DWR, the SWRCB can declare the basin to be a "probationary basin" and seek to intervene in it. (Water Code § 10735.2(a)(2)-(5).)

D. The Powers of GSAs

SGMA grants GSAs significant powers to implement and enforce GSPs, but does not require that GSAs use them. These powers are a "toolbox" from which GSPs can select appropriate measures for their basins. All powers that SGMA grants to a GSA are in addition to the GSA's normal powers as a public agency. (Water Code § 10725(a).) SGMA authorizes a GSA to do, among other things:

- "[P]erform any act necessary or proper to carry out the purposes of this part [SGMA]" (Water Code § 10725.2(a));
- Conduct an investigation, including inspections of property and facilities (Water Code § 10725.4);
- Require that wells be measured "by a water-measuring device" at the owner's cost (Water Code § 10725.8(a)-(b));
- Require the filing of annual extraction statements (Water Code § 10725.8(c));
- Purchase, transfer, deliver or exchange water or water rights (Water Code § 10726.2(d));

- To prevent well interference, impose spacing requirements on new wells and "reasonable operating regulations" (Water Code § 10726.4(a)(1));

- Control groundwater extractions by regulating, limiting, or suspending extractions from individual wells or wells in the aggregate, in a manner consistent with applicable city or county general plans, unless there is insufficient sustainable yield to serve land uses within that plan (Water Code § 10726.4(a)(2));

- "[A]uthorize temporary and permanent transfers of groundwater extraction allocations within the agency's boundaries," if the total quantity of groundwater extracted is consistent with the GSP (Water Code § 10726.4(a)(3)); and

- Impose fees to fund preparation, amendment and implementation of a GSP. (Water Code §§ 10730-10730.2).

A GSA's limitation of groundwater extractions "shall not be construed to be a final determination of rights to extract groundwater from the basin or any portion of the basin." (Water Code § 10726.4(a)(2).) Nothing in SGMA "determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights." (Water Code § 10720.5(b).)

E. The SWRCB's Powers in Probationary Basins

The SWRCB, after notice and hearing, may declare a medium- or high-priority basin to be a "probationary basin" if:

(1) after June 30, 2017, no agency or collection of agencies became a GSA or GSAs to adopt and implement a GSP or a GSP alternative for the basin;

(2) after January 31, 2020, in critically overdrafted basins, no GSA or GSAs have adopted a GSP or GSPs that cover the entire basin and DWR has not approved a GSP alternative for the basin;

(3) after January 31, 2020, for critically overdrafted basins, DWR, in consultation with the SWRCB, determines that a GSP or GSPs are inadequate or that the GSP is not being implemented in a manner that is likely to achieve the sustainability goal;

(4) after January 31, 2022, for other medium- and high-priority basins, no GSA or GSAs have adopted a GSP or GSPs that cover the entire basin and DWR has not approved a GSP alternative for the basin;

(5) after January 31, 2022, for other medium- and high-priority basins: (a) DWR, in consultation with the SWRCB, determines that a GSP or GSPs are inadequate or that the GSP is not being implemented in a manner that is likely to achieve the sustainability goal; and (b) the SWRCB determines that the basin is in a condition of long-term overdraft; or

(6) after January 31, 2025, for other medium- and high-priority basins: (a) DWR, in consultation with the SWRCB, determines that a GSP or GSPs are inadequate or that the GSP is not being implemented in a manner that is likely to achieve the sustainability goal; and (b) the SWRCB determines that the basin is in a condition where groundwater extractions result in significant depletions of interconnected surface waters. (Water Code § 10735.2(a).)

The SWRCB's probationary-basin determination can require that groundwater pumping in the basin be reported to the SWRCB. (Water Code § 10735.2(c)(3).)

"The [SWRCB] can exclude from probationary status any portion of any basin for which a groundwater sustainability agency demonstrates compliance with the sustainability goal." (Water Code § 10735.2(e).) In some cases, GSAs can have 180 days to resolve the deficiencies that led to the probationary-basin determination and, in those cases, the SWRCB can extend that time if a local agency is making "substantial progress toward remedying the deficiency." (Water Code § 10735.4(a)-

(b).) Those cases involve the lack of a GSA and the lack of an adopted GSP. (Water Code §§ 10735.2(a)(1), (a)(2), (a)(4); 10735.4(a).)

If the SWRCB designates a basin as a probationary-basin, then the SWRCB, after notice and a public hearing, can impose an "interim plan" to regulate the basin. (Water Code §§ 10735.6(b), 10735.8(a).) The SWRCB's interim plan must include: (1) elements of a GSP that the SWRCB "finds complies with the sustainability goal of that portion of the basin or would help meet the sustainability goal for the basin;" (2) "Identification of the actions that are necessary to correct a condition of long-term overdraft or a condition where groundwater extractions result in significant depletions of interconnected surface waters;" (3) "A time schedule for actions to be taken;" and (4) "A description of the monitoring to be undertaken to determine effectiveness of the plan." (Water Code § 10735.8(b), (e).) The SWRCB's interim plan may include: (1) "Restrictions on groundwater extractions;" (2) "A physical solution;" and (3) "Principles and guidelines for the administration of rights to surface waters that are connected to the basin." (Water Code § 10735.8(c).) The SWRCB may not adopt an interim plan "to remedy a condition where the groundwater extractions result in significant depletions of interconnected surface waters" before January 1, 2025. (Water Code § 10735.8(h).)

The SWRCB must remove a basin's probationary status under certain conditions. On a petition by a GSA that has adopted a GSP for a basin or a portion of a basin, or by an entity authorized under a court adjudication, the SWRCB shall rescind an interim plan if it determines that the GSP or adjudication is adequate to eliminate long-term overdraft or significant depletions of interconnected surface waters and there are adequate assurances that implementation will occur. (Water Code § 10735.8(g).) The SWRCB must act on the petition within 90 days "after the petition is complete." (Water Code § 10735.8(g)(2).)

The SWRCB can impose and collect fees to fund its administration of probationary basins and interim plans. (Water Code §§ 1529.5, 10736(d)(3).)

5. Water Transfers

A. General

The State Board has published additional information on water transfers.[3] (See.)

Several sections of the Water Code contain declarations of state policy favoring voluntary water transfers. For example, Water Code section 109 contains a declaration of state policy favoring voluntary water transfers, and directs DWR, the State Board and all other state agencies to encourage voluntary transfers. Water Code section 475 contains legislative findings and declarations favoring voluntary water transfers, states that the coordinated assistance of state agencies is required for voluntary transfers, and directs DWR to establish an ongoing program to facilitate voluntary water transfers.

Several statutory provisions declare that the act of transferring water will not, by itself, result in a forfeiture of the underlying water right. For example, Water Code section 1244 states that a water transfer, in itself, will not constitute evidence of waste or unreasonable use, and will not affect any determination of forfeiture of an appropriative right. Water Code section 1745.07 states that no transfer of water pursuant to any provision of law will cause a forfeiture, diminution or impairment of any water right, and that a transfer approved under any provision of law is deemed to be a beneficial use of water by the transferor. (See also Water Code §§ 1010, 1011, 1011.5, 1014 - 1017, 1440, 1731 and 1737.)

The transferability of water depends on the source of the water right being transferred. The following provisions of the Water Code provide authority to carry out water transfers: Water Code sections 1011(b) ("Transfer of Conserved Water"), 1020 through 1031 ("Water Leases"), 1435 through 1442 ("Temporary Urgency Change"), 1700 through 1705 ("Permanent Changes"), 1707 ("Transfers for Instream Uses"), 1706 ("Transfer of Pre-1914 Rights"), 1725 through 1732 ("Temporary Transfers"), 1735 through 1737 ("Long-Term Transfers"), 1740 ("Transfer of Decreed Rights") and 1745 through 1745.11 ("Transfers by Water

[3] www.waterrights.ca.gov/watertransfer/waterboards.ca.gov/waterrights/water_issues/programs/water_transfers/

Suppliers"). In addition, the enabling legislation for a number of different types of water districts includes authorization to transfer surplus water. See, for example, Water Code sections 22228 ("Irrigation Districts") and 35425 ("California Water Districts").

B. Transfers Under a Riparian Water Right

It is well-settled under California law that a riparian water right generally is not transferable for use on nonriparian land. (See, e.g., *People v. Shirokow* (1980) 26 Cal.3d 301.) A riparian owner may, however, enter into a contract under which he or she agrees not to exercise the riparian right for his or her property, so as to increase the downstream water supply. Such an agreement would not prevent a downstream riparian owner from exercising his riparian right. DWR has entered into "water transfer" agreements with riparian landowners in the Delta under which the riparian owner agreed for compensation not to exercise his or her riparian right. Water that was left in the river was pumped from the Delta as part of DWR's Water Bank operations.

Under Water Code section 1707, however, riparian rights are among the water rights that may be included within a change petition to the State Board for the purpose of preserving or enhancing wetlands habitat, fish and wildlife resources, or recreation in or on the water. An adjudicated riparian right can be transferred under Water Code section 1740.

C. Transfers Under an Appropriative Water Right

An appropriative water right can be sold or transferred off the land by changing the place of use under the right. Under Water Code section 1706, the point of diversion, place of use or purpose of use of a pre-1914 appropriate right can be changed if others are not injured by that change. The transfer or other change involving the exercise of a post-1914 appropriate right requires the approval of the State Board under Water Code sections 1020, 1435, 1700, 1707 (for instream uses), 1725 or 1735, and State Board findings that the proposed transfer would not injure legal users or unreasonably effect fish, wildlife or other instream beneficial uses. Under Water Code section 1729, a water transfer under section 1725 for not longer

than one year is exempt from the provisions of the California Environmental Quality Act.

D. Transfers of Groundwater

There are no general statutory procedures for the transfer of groundwater, although SGMA allows for a groundwater sustainability agency to make pumping allocations transferable. (See Water Code § 10726.4(a)(3).) Under Water Code section 1220, groundwater may not be pumped for export from the combined Sacramento and Delta-Central Sierra Basins (as defined in DWR Bulletin 160-74), unless the pumping is in compliance with a groundwater management plan that was adopted by ordinance of the county board of supervisors and approved by the voters of the county that overlies the affected groundwater basin. DWR contends that the transfer of groundwater for Delta outflow rather than export purposes would not violate Water Code section 1220.

A number of counties within the Sacramento Valley have adopted ordinances that regulate the direct export of groundwater. One such ordinance has been upheld as a valid exercise of the police power that was not preempted by general state legislation. (See *Baldwin v. County of Tehama* (1994) 31Cal.App.4th 166.)

For groundwater basins that have been adjudicated by a court, the court's judgment often establishes unique conditions concerning the transfer of groundwater rights in the basin. (See *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266.)

E. Transfers of Water Under a Contractual Entitlement

Under California law, the right to water under a contract or as result of owning land within a water district is not transferable in whole or in part without the consent of the water right holder and the water supplier. (See, e.g., Water Code §§ 382-383 and 1745.04.) Under section 3405(a) of the federal Central Valley Project Improvement Act (Title 34 of Public Law 102-575), the Secretary of the Interior is authorized to approve an application of an individual water user to transfer his or her federal CVP water entitlement without the consent of the water district that holds the CVP contract under which the water is supplied. However, transfers

involving more than twenty percent of the CVP water subject to a long-term contract within a contracting district or agency also are subject to review by the district or agency under the provisions specified in Section 3405(a)(1) of the CVP Improvement Act.

F. Transfers by Public Agencies

In addition to the provisions discussed above that deal with the ability to transfer water under different types of water rights, there are numerous statutory provisions that deal with the authority of public agencies to transfer water. Before a public agency undertakes a water transfer, it must determine that it has authority in its enabling legislation, or elsewhere, to transfer water for use outside its boundaries. Water Code sections 382 and 1745 - 1745.11 provide alternative sources of authority for a public agency to transfer surplus water for use outside of its boundaries. Under Water Code section 1745.10, surface water that is transferred under these provisions may not be replaced with groundwater unless such groundwater use is consistent with a groundwater management plan adopted pursuant to State law for the affected area, or the substitution of groundwater was approved by the transferring agency after it determined that the transfer would not create or contribute to conditions of long-term overdraft in the affected groundwater basin. The transfer would also have to be carried out in compliance with applicable procedural requirements, such as under Water Code sections 1706 or 1725.

G. Determining What Water Is Transferable - The "No Injury" Rule

An important element of any water transfer is determining what quantity, if any, of the water is "transferable," as a result of the application of provisions of the Water Code that are intended to protect other legal users of water and fish and wildlife from the possible adverse effects of a water transfer. The "no injury" rule originates in the common law, and also is reflected in Water Code provisions intended to protect legal users of water from injury from a water transfer. (See, e.g., Water Code §§ 1702, 1706, 1725.) Under the no injury rule, a water transfer would not be authorized to the extent that it reduced the availability of water for downstream users, regardless of the water priority of those users. Under the no injury rule, only "new water" is transferable, i.e., water that is added to the

downstream water supply as a result of the transfer. The rationale for the "no injury" rule is as follows: ". . . California water law protects senior water users (those with the oldest water rights) from junior diverters while protecting junior water right holders from the expansion of senior water rights. Junior water right holders would be harmed if seniors could increase the amount of water they divert under their senior priority. Likewise, juniors could be hurt if seniors could change their point of diversion, place of use or purpose of use in a manner that reduces the quantity or quality of water relied upon by juniors for their diversion. The 'no injury' rule protects junior right holders against this kind of harm from senior right holders." (See *A Guide to Water Transfers*, July 1999, pages 3-7 and 3-8, published by the State Board.) Under section 3405(a)(1)(M) of the CVP Improvement Act, however, one CVP contractor can transfer unused entitlement under its CVP water supply contract to another CVP contractor for use within the watersheds of origin.

H. Transfers of Conserved Water

Under Water Code section 1011, the right to the use of water that has been reduced as a result of water conservation efforts may be transferred pursuant to any provision of law relating to the transfer of water. For purposes of this section, "water conservation" means the use of less water to accomplish the same purpose of use allowed under the existing appropriative water right. In order to obtain the benefits of this section, the water right holder generally must file periodic reports with the State Board that describe how water use was reduced due to the water conservation efforts.

On December 28, 1999, the State Board issued Order WR 99-012, which involved a proposed transfer of conserved water under Water Code sections 1725 and 1011 involving licensed water rights of Natomas Central Mutual Water Company. The State Board determined that Natomas could transfer the right to use of the amount of water that Natomas would have consumptively used but for Natomas' water conservation efforts, but that a reduction in diversions in itself that did not reduce consumptive use could not be transferred under Water Code section 1725.

State Board Order WR 99-012 describes the purpose of Water Code section 1011 as follows: "Section 1011 preserves an appropriative water right when less

water is used under the right due to water conservation efforts. Essentially, section 1011 requires water to be treated as though it were used, when in actuality the water is conserved. Any reduction or cessation in the use due to conservation efforts is 'deemed equivalent to a reasonable beneficial use....' Thus, the right to use the amount of water conserved is not subject to forfeiture for nonuse. The right thereby protected from forfeiture may be used later if needed. The right to use the water conserved may also be transferred pursuant to other provisions of law authorizing transfers."

The State Board order also points out that, since 1980, the State Board has required licensees to document their conservation efforts in their required reports of licensee. The State Board order also states: "It also merits note that Natomas' failure to report conservation efforts in a timely manner called into question the credibility of its claim to have conserved water. Late reporting raises the question whether the nonuse of water was in fact due to conservation efforts, or if the water user is attempting to characterize nonuse that occurred for some other reason as water conservation in order to obtain the protections of section 1011. Conversely, reporting water conservation in a timely manner, while insufficient in itself to prove water conservation, would tend to support a claim that the nonuse of water was the result of water conservation efforts. For this reason, it is in every water user's best interest to report water conservation efforts in a timely manner."

I. Use of Conveyance Facilities for a Water Transfer

As a practical matter, State Water Project and federal Central Valley Project facilities are often needed to convey transfer water to the place of use of the transferee, such as for through-Delta transfers. Water Code sections 1810-1814 authorize joint use of unused capacity in water conveyance facilities, requiring the state, regional and local public agencies that own water conveyance facilities to make available up to seventy percent of their unused capacity for a bona fide water transfer upon payment of fair compensation, and so long as: (1) no legal user of water would be injured; (2) there would be no unreasonable effect on fish, wildlife or other instream beneficial uses; and (3) there would be no unreasonable effect on the overall economy or the environment of the county from which the water is being transferred. Use of CVP facilities to convey non-CVP water would require a Warren Act contract with the United States (43 U.S. Code §§ 523-525 and 2212), which

would include provisions to compensate for use of federal facilities and to ensure that the transfer does not interfere with the operation of federal facilities. Water Code sections 1810 through 1814 also govern transfers through conveyance facilities that are not part of the State Water Project or the Central Valley Project. (See *San Luis Coastal Unified School Dist. v. City of Morro Bay* (2000) 81 Cal.App.4th 1044.)

J. Third-Party Impacts from a Water Transfer

There has been confusion from time to time regarding the terms used to refer to potential impacts to others resulting from a proposed water transfer. There generally are three types of potential impacts: (1) injury to legal users of water; (2) unreasonable effects on fish, wildlife or other instream beneficial uses; and (3) unreasonable effects on the overall economy of the area from which the water would be transferred.

The requirement to avoid impacts to "legal users" (discussed above) is set forth in various provisions of existing law. For example, see Water Code section 386 (as to State Board approval of certain water transfers), section 1706 (as to a transfer under a pre-1914 water right), section 1707 (as to a transfer for instream uses), section 1727 (as to a temporary transfer under a water right permit), section 1736 (as to a long-term transfer under a water right permit) and section 1810 (as to determinations of DWR concerning use of surplus conveyance capacity).

The requirement to avoid unreasonable effects on fish, wildlife or other instream beneficial uses is also set forth in various provisions of existing law. For example, see Water Code section 386, section 1707, section 1727, section 1736 and section 1810.

The requirement to avoid unreasonable effects on the overall economy of the area from which the water would be transferred (what is commonly referred to as "third-party economic impacts") is provided for in more limited situations. Water Code section 386 has such a provision, but it is in a chapter on State Board approval of water transfers that is rarely used. Water Code Sections 1725 through 1732 are in the chapter that is generally relied on for State Board approval of a temporary water transfer (i.e., for a term of less than one year), and section 1727 requires the State Board to consider only impacts to legal users and instream uses (i.e., the State

Board is not authorized to consider third-party economic impacts). The same section 1727 requirements are also contained in section 1736 for approval of a long-term water transfer. Water Code section 1810(d) requires DWR, however, to consider all three types of impacts (i.e., to legal users, to instream uses and to the economy of the area from which the water would be transferred) in determining whether to allow use of its surplus water system conveyance capacity for a water transfer.

Generally, transfer water is developed through four methods: (1) surplus water released from storage facilities; (2) substituting groundwater for transferred surface water; (3) fallowing agricultural land to make water available for transfer; and (4) undertaking conservation activities that develop surplus water (e.g., under Water Code section 1011). Transfers from storage and transfers resulting from conservation activities have little or no likelihood to cause third-party economic impacts because these types of transfers do not affect crop production or groundwater pumping. Therefore, it would not seem necessary or appropriate to require an analysis of potential third-party impacts from these two types of transfers.

There are other provisions of existing law that have the effect of limiting the extent to which water transfers that involve land fallowing or groundwater substitution would cause third-party economic impacts. For example, Water Code section 1745.05 (which authorizes water suppliers to transfer surplus water) puts a limit on the amount of land that may be fallowed in connection with a water transfer. Subdivision (b) of this section states: "The amount of water made available by land fallowing may not exceed 20 percent of the water that would have been applied or stored by the water supplier in the absence of any contract entered into pursuant to this article in any given hydrological year, unless the agency approves, following reasonable notice and a public hearing, a larger percentage."

Water Code section 1732 states that a petition for State Board approval of a temporary water transfer that involves the increased use of groundwater to replace transferred surface water must be in compliance with Water Code sections 1745.10 and 1745.11. Sections 1745.10 and 1745.11 generally require a water supplier that increases the use of groundwater to replace transferred surface water to determine that the groundwater use: (1) would be consistent with a groundwater management

plan adopted pursuant to State law for the affected area; or (2) would not create or contribute to conditions of long-term overdraft in the affected groundwater basin.

Section 3405 of the federal Central Valley Project Improvement Act (Title 34 of Public Law 102-575) includes provisions that would limit the amount of federal water that a water district could transfer. For example, subsection (a)(1) states in part: "Transfers involving more than 20 percent of the Central Valley Project water subject to long-term contract within any contracting district or agency shall also be subject to review and approval by such district or agency under the conditions specified in this subsection … [including a determination by the Secretary of Interior that the transfer would have no significant long-term adverse impact on groundwater conditions]."

K. Environmental Review of Water Transfers

In general, water transfers are subject to compliance with the requirements of the California Environmental Quality Act and the National Environmental Policy Act, to the extent applicable. Water Code section 1729 provides an exemption from compliance with CEQA for temporary water transfers under Water Code sections 1725 through 1732.

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